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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 115

WARREN TRADING POST COMPANY, a Corporation,
Appellant,

v.

THE ARIZONA STATE TAX COMMISSION, THAD D. MOORE, WARREN PETERSON and W. E. STANFORD, as members of the Arizona Tax Commission, *Appellees.*

BRIEF ON BEHALF OF ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC., HUALAPAI TRIBE OF ARIZONA, SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, AND SAN CARLOS APACHE TRIBE OF ARIZONA, AS AMICI CURIAE

Counsel for the parties have consented in writing to the filing of a brief in the above-entitled case on behalf of the Association on American Indian Affairs, Inc., the Hualapai Tribe of Arizona, the Salt River Pima-Maricopa Indian Community and the San Carlos Apache Tribe of Arizona, as *amici curiae.*

INTEREST OF AMICI CURIAE

The Association on American Indian Affairs is a non-profit, membership corporation, organized under the laws of the State of New York, which is primarily devoted to safeguarding the rights and promoting the welfare of American Indians. The Hualapai Tribe, the Salt River Pima-Maricopa Indian Community and the San Carlos Apache Tribe are recognized tribes of American Indians, all organized under Section 16 of the Act of June 18, 1934, 48 Stat. 984, 987, 25 U.S.C. 476, which have a combined population of about 6,200 and which occupy reservations totalling about 2,900,000 acres within the State of Arizona.

The interest of the Association and the three Arizona tribes in the instant proceeding is to assist this Court in determining whether a State lawfully may impose a tax upon a non-Indian trader for the privilege of doing business with Indians within an Indian reservation. More specifically, the object of this brief of *amici curiae* is to demonstrate that the Arizona privilege tax, to the extent so assessed: (1) places a burden upon commerce with Indian tribes in violation of Article I, Section 8, Clause 3 of the United States Constitution; and (2) interferes illegally with the exercise by Indian tribes of their inherent powers of local self-government.

The interest of the Association and the three Arizona tribes in the validity of the State privilege tax as applied to non-Indian traders also reflects a deep concern over its practical effect upon the reservation economy. American Indians generally, and the Indians of Arizona in particular, are today, as they have been for years, at the very bottom of the economic scale in

the United States.[1] Indeed, according to recent statistics compiled by the Bureau of Indian Affairs, the average median family income for all Arizona reservations still amounts to only $1,357 annually, and 49% of the Indian work force within the State is unemployed. For people so immersed in poverty, a privilege tax measured by gross sales which obviously is passed on through higher prices to the ultimate consumer has direct impact and costly consequences.

STATEMENT OF THE FACTS

The facts in this case are not in dispute. Appellant, Warren Trading Post Company, is an Arizona corporation licensed by the Commissioner of Indian Affairs under the Act of August 15, 1876, 19 Stat. 200, 25 U.S.C. 261, to do business at Kayenta on the Navajo Indian Reservation in Navajo County, Arizona (T.R. 4-5). Appellant leases land from the Navajo Tribe and, among other activities, engages thereon in the retail sale of personal property to Indians.

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[1] *Health Services for American Indians*, Public Health Service Publication No. 531 (GPO, 1957); pp. 26-7, 30-2; Meriam, *The Problem of Indian Administration* (Johns Hopkins Press, 1928), pp. 4, 448. In a speech delivered in the House of Representatives on August 14, 1951, the Hon. Frank T. Bow, a member of the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, reported: "The average Indian family cash income is $1,324 per year. * * * In matters of income it can be easily seen that the Indians as a whole constitute one of the lowest level groups in the United States." 97 Cong. Rec. 9993 *et seq.* Of the ten Arizona Indian groups for which average *family* incomes in 1950 were given in the appendix to the speech, nine were below the national average for Indians, and eight showed an average family income below $1,000. These figures should be contrasted with the estimate of the Department of Commerce that in 1950 the average *per capita* income of all individuals in Arizona was $1,240. 1952 *World Almanac* at 674.

Appellees, the Arizona State Tax Commission and its individual members, have asserted that appellant is subject to the provisions of the Arizona Transaction Privilege Act which requires every person within the State who receives gross proceeds of sale or gross income from sales to obtain a license for a fee of $1.00. Arizona Revised Statutes § 42-1308. Appellees have further assessed against Warren Trading Post Company a tax under Arizona Revised Statutes § 42-1312 and Commission Regulation 2.18.5 measured by an amount equal to two per cent of its gross sales of tangible personal property at retail (T.R. 6).[2] The State tax, the parties agree, is a privilege tax imposed upon the seller for the privilege of engaging in business and is not a sales tax imposed upon the purchaser. *Arizona State Tax Commission* v. *Garrett Corp.*, 79 Ariz. 389, 291 P. 2d 208 (1955); see Appellant's

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[2] Arizona Revised Statutes § 42-1312 provides in material part:

> "A. The tax imposed by subsection A of § 42-1309 shall be levied and collected at an amount equal to two per cent of the gross proceeds of sales or gross income from the business upon every person engaging or continuing within this state in the business of selling any tangible personal property whatever at retail, . . ."

Arizona State Tax Commission, Combined Privilege Sales and Use Tax Regulation 2.18.5 provides

> "*Trading Posts on Indian Reservations.* A person operating a commissary or trading post on an Indian reservation, under an agreement or license with the Indian agency, is subject to the tax levied upon retail sales. All proceeds of sales from whatever source derived are subject to the Transaction Tax upon the operator of the trading post making the sale. The vendor is subject to the Transaction Tax on gross proceeds of sales made to Indians residing on the reservation as well as off the reservation. Sales directly to the Federal Government are subject to 50% deduction."

Jurisdictional Statement, p. 11 and Appendix A therein, p. 2.

On August 26, 1958, Warren Trading Post Company filed suit in the Superior Court of Arizona for Maricopa County seeking a declaratory judgment that the application of the Arizona Transaction Privilege Act to retail sales of personal property by an Indian trader to Indians within the Navajo Indian Reservation is unlawful and invalid (T.R. 4-12). The Superior Court ruled against the taxpayer (Appellant's Jurisdictional Statement, Appendix B), and the Arizona Supreme Court affirmed that decision upon appeal. *Warren Trading Post Company* v. *Moore,* 95 Ariz. 110, 387 P. 2d 809 (1963). This court noted jurisdiction on October 12, 1964. 33 *Law Week* 3127.

QUESTION PRESENTED

The sole question presented in this case is whether the State of Arizona may require a license from and impose a tax upon a non-Indian trader for the privilege of selling personal property to Indians within an Indian reservation.

ARGUMENT

I. THE APPLICATION OF THE ARIZONA PRIVILEGE TAX TO MERCHANTS DOING BUSINESS WITH INDIANS ON INDIAN RESERVATIONS VIOLATES THE CONSTITUTION AND LAWS OF THE UNITED STATES.

A. Article I, Section 8, Clause 3 of the Constitution Vests in the Federal Government an Exclusive Right to Regulate and Control Commerce With Indian Tribes.

The power of Congress to regulate commerce with Indian tribes has been described as "paramount and of a most sweeping character." *People ex rel. Ray* v. *Martin,* 294 N.Y. 61, 60 N.E. 2d 541 (1945), affirmed

326 U.S. 496 (1946). The broad scope of the power, expressed in Article I, Section 8, Clause 3 of the Constitution, stems from a recognized need in the early days of our country to develop a uniform, nationwide policy in the conduct of Indian affairs. As explained by this Court in *United States* v. *Forty-three Gallons of Whiskey,* 93 U.S. 188 (1876) at 194:

> "Under the Articles of Confederation of 1777, two limitations were placed upon the power of Congress over Indian affairs: the Indians must not be members of any State, nor must Congress do anything to violate or infringe the legislative right of a State within its own limits. Of necessity, these limitations rendered the power of no practical value. This was seen by the Convention which framed the Constitution; and Congress now has the exclusive and unfettered power to regulate commerce with the Indian Tribes, a power as broad as that to regulate commerce with foreign nations. The only efficient way of dealing with the Indian Tribes was to place them under the protection of the General Government."

As the foregoing quotation illustrates, the Indian commerce clause sometimes has been called "a power as broad as that to regulate commerce with foreign nations." *United States* v. *Forty-three Gallons of Whiskey, supra; Dick* v. *United States,* 208 U.S. 340, 356 (1908); *Perrin* v. *United States,* 232 U.S. 478, 484 (1914). On other occasions, the power of Congress to regulate commerce with Indian tribes has been said to be "not less than its power over commerce among the states." *Hanley* v. *Kansas City S.R. Co.,* 187 U.S. 617, 619 (1903). Regardless of the characterization employed, this Court in each such case has ruled that

Article I, Section 8, Clause 3 vests an exclusive power in Congress to regulate commerce with Indian tribes and precludes regulation by any State.

Commerce with Indian tribes means commerce with the individuals who compose those tribes. *United States* v. *Holliday,* 3 Wall. (U.S.) 407, 417 (1866); *United States* v. *Nice,* 241 U.S. 591 (1916). In this case, the State of Arizona is requiring a State license from, and imposing a tax upon, merchants for the privilege of doing business with Indians on an Indian reservation. The Arizona Transaction Privilege Act, as so applied, regulates trade with an Indian tribe and, therefore, clearly contravenes the Indian commerce clause of the Federal Constitution. Cohen, *Federal Indian Law* (Interior Department Revision, 1958), pp. 867-73; 57 Decisions of the Department of the Interior 124 (1940), confirmed in 58 Decisions of the Department of the Interior 562 (1943).

B. The State's Assessment of a Tax Against Reservation Traders for the Privilege of Selling Personal Property to Indians Constitutes an Unlawful Burden on Commerce With Indian Tribes.

The court below rationalized application of the Arizona privilege tax to sales on Indian reservations by analogy to the cases in which this Court has sustained State taxes which have only an incidental effect upon interstate commerce. *Warren Trading Post Company* v. *Moore,* 95 Ariz. 110, 387 P. 2d 809, 814 (1963). In formulating this thesis, the Arizona Supreme Court wholly ignored the vital distinction between taxes which fairly compensate a State for local benefits and taxes which directly interfere with the free flow of commerce. One clear rule which may be

deduced from this Court's decisions construing Article I, Section 8, Clause 3, is that privilege taxes—such as the Arizona Transaction Privilege Act—measured by gross receipts and not apportioned to reflect local services provided the taxpayer by the taxing State, are unconstitutional. *Railway Express Agency, Inc.* v. *Virginia,* 347 U.S. 359 (1954); *Joseph* v. *Carter & Weeks Stevedoring Co.,* 330 U.S. 422 (1947); *Puget Sound Stevedoring Co.* v. *State Tax Commission,* 302 U.S. 90 (1937).

Upon analysis, the Arizona privilege tax, as imposed upon traders with Indians on Indian reservations, seems to embody all the evils which have caused this Court to invalidate State revenue statutes applied to interstate activities. The Arizona Transaction Privilege Act, for example, attempts to regulate commerce with Indian tribes by requiring a State license for, or payment of a tax upon, the privilege of doing business, practices held illegal when applied to interstate commerce in *Memphis Steam Laundry* v. *Stone,* 342 U.S. 389 (1952), *Spector Motor Service Co.* v. *O'Connor,* 340 U.S. 602 (1951), and *Robbins* v. *Taxing District of Shelby County,* 120 U.S. 489 (1887). The Arizona privilege tax is measured by gross receipts, a basis for assessing taxes held to create an unlawful burden upon interstate and foreign commerce, respectively, in *J. D. Adams Mfg. Co.* v. *Storen,* 304 U.S. 307 (1938), and *Crew Levick Co.* v. *Pennsylvania,* 245 U.S. 292 (1917). Finally, the Arizona Transaction Privilege Act violates the commerce clause by failing to apportion the tax in reasonable relationship to the local benefits, if any, which the State provides

the taxpayer.[3] *Central Greyhound Lines* v. *Mealey*, 334 U.S. 653 (1948); *Freeman* v. *Hewit*, 329 U.S. 249 (1944); cf. *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250 (1938).

The court below further cites *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598 (1943), as authority for the proposition that Congress has not immunized Indian reservations from the application of State excise taxes. While holding therein that a State inheritance tax may be assessed against the restricted personal property of Indians, this Court carefully pointed out that Oklahoma tribes are not "separate political entities with all the rights of independent status" and "have no effective tribal autonomy" (319 U.S. at 602-3),[4] that Oklahoma Indians have the resources to pay estate taxes (319 U.S. at 609, fn. 13), and that the State of Oklahoma provides its Indian citizens with services furnished elsewhere by the Federal Government (319 U.S. at 609). *Oklahoma Tax Commission* v. *United States*, *supra*, therefore, is hardly precedent for sanctioning the application on an Arizona reservation of a regressive State excise tax which is passed on to rich

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[3] The tribes involved and the United States furnish virtually all governmental services on Indian reservations in Arizona. A more detailed treatment of this subject, and the manner in which the State privilege tax exposes traders in Indian country to the risks of multiple taxation, appears at pp. 14, 15, *infra*.

[4] Compare *United States* v. *Forty-three Gallons of Whiskey*, 93 U.S. 188 (1876) at 195 as follows:

> "As long as the Indians remain a distinct people, with existing tribal organizations, recognized by the Political Department of the Government, Congress has the power to say with whom, and on what terms they shall deal, and what articles shall be contraband."

and poor Indian buyers alike, which produces revenue not returned in State services, and which imposes a direct burden on commerce with existing Indian tribes.[5]

C. The Federal Government Has Pre-empted the Field of Licensing Non-Indian Traders on Indian Reservations.

In accordance with Article I, Section 8, Clause 3 of the Constitution, Congress has exercised an authority to regulate commerce with Indian tribes. Specifically, Section 5 of the Act of August 15, 1876, 19 Stat. 200, 25 U.S.C. 261, provides:

> "The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians."

Other statutes empower the Commissioner of Indian Affairs, under such rules and regulations as he may prescribe, to permit persons "to trade with the Indians on any Indian reservation,"[6] allow the President "to prohibit the introduction of goods, or any particular article, into the country belonging to any Indian tribe, and to direct all licenses to trade with such tribe

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[5] Equally inapposite is *Thomas* v. *Gay*, 169 U.S. 264 (1898), where a State tax levied against the personal property of a non-Indian within an Indian reservation was upheld. In the *Thomas* case, this Court found that "a tax put upon the cattle of the lessees is too remote and indirect to be deemed a tax upon the lands or privileges of the Indians" (169 U.S. at 273). Although imposed upon non-Indian traders, the State tax at issue herein obviously is passed on through higher prices to Indian consumers.

[6] Act of March 3, 1901, 31 Stat. 1066, as amended by the Act of March 3, 1903, 32 Stat. 1009, 25 U.S.C. 262.

to be revoked,'"[7] and provide criminal penalties for any person "other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein," without the required Federal license.[8]

Read together, the foregoing laws evidence a comprehensive Congressional scheme to control trade with Indians on Indian reservations through officers of the United States.[9] So total is the Federal occupation of the field that any State legislation affecting commerce with Indian tribes in Indian country, including the Arizona Transaction Privilege Act, is *prima facie* invalid under the doctrine of pre-emption.[10]

Indeed, the statutory program of the Federal Government for regulating traders doing business with Indians on Indian reservations satisfies all the tests for barring the application of State law approved by this Court in *Pennsylvania* v. *Nelson*, 350 U.S. 497 (1956), and *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S.

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[7] R.S. § 2132, 25 U.S.C. 263.

[8] R.S. § 2133, as amended by the Act of July 31, 1882, 22 Stat. 179, 25 U.S.C. 264.

[9] Complete regulations governing licensed Indian traders are set out in 25 C.F.R. Part 251. Special regulations governing traders on the Navajo, Zuni and Hopi Reservations are set out in 25 C.F.R. Part 252.

[10] Where, as in this case, a direct conflict exists between a State statute and a Federal statute within the power of Congress to enact, the doctrine of pre-emption is unnecessary. *Kelly* v. *Washington*, 302 U.S. 1, 9 (1937); see also *Sperry Oil and Gas Co.* v. *Chisholm*, 264 U.S. 488 (1924). The discussion which follows assumes, solely for the sake of argument, that no such conflict is here present.

218 (1947). First, the scheme of Federal regulation on its face is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, as would be the case if Arizona's licensing requirement were sustained. Secondly, the Federal statutes occupy an area in which the interest of the United States is so dominant that the Constitution must be assumed to preclude enforcement of State laws relating to the same subject. *Williams* v. *Lee,* 358 U.S. 217 (1959); *Creek County* v. *Seber,* 318 U.S. 705 (1943); *United States* v. *Kagama,* 118 U.S. 375 (1886); *The Kansas Indians,* 5 Wall. (U.S.) 737 (1867). Thirdly, enforcement of the Arizona Transaction Privilege Act presents a serious danger of conflict with the Federal program of fostering tribal self-government. Point II, *infra.*

Under the circumstances, even if the Indian commerce clause did not directly prohibit a State from imposing a tax upon the privilege of doing business with Indians on an Indian reservation, Congress under the doctrine of pre-emption has precluded application of the Arizona Transaction Privilege Act to non-Indian merchants in Indian country by adopting a comprehensive Federal statutory scheme for licensing Indian traders and otherwise regulating commerce with Indian tribes.

II. THE IMPOSITION OF THE ARIZONA PRIVILEGE TAX UPON MERCHANTS DOING BUSINESS WITH INDIANS ON INDIAN RESERVATIONS CONSTITUTES AN ILLEGAL INTERFERENCE WITH TRIBAL SOVEREIGNTY.

Indian tribes early were recognized as distinct, independent political communities in which the laws of a State could have no force and which its citizens had no right to enter. *Worcester* v. *Georgia,* 6 Pet. (U.S.) 515, 559-61 (1832). "Over the years this

Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of Worcester has remained." *Williams* v. *Lee,* 358 U.S. 217, 219 (1959). The test of whether a State statute may be enforced upon an Indian reservation is "whether the application of that law would interfere with reservation self-government." *Organized Village of Kake* v. *Egan,* 369 U.S. 60, 67-8, 75 (1962); *Williams* v. *Lee, supra,* at 220.

The power to levy taxes is an inherent attribute of tribal sovereignty and, except as limited by treaty or act of Congress, properly may be exercised over non-Indians doing business within the exterior boundaries of Indian reservations. *Iron Crow* v. *Oglala Sioux Tribe,* 231 F. 2d 89, 98-9 (C.A. 8, 1956); *Buster* v. *Wright,* 135 Fed. 947 (C.A. 8, 1905), appeal dismissed 203 U.S. 599 (1906); *Morris* v. *Hitchcock,* 21 App. D.C. 565 (1903), affirmed 194 U.S. 384 (1904); Cohen, *Federal Indian Law* (Interior Department Revision, 1958), pp. 345-39; 55 Decisions of the Department of the Interior 14, 46-8. The Federal Government has not exempted licensed traders on Indian reservations from tribal taxes. Indeed, far from restricting the taxing powers of Indian tribes, the United States during recent years actually has encouraged and assisted Indians to assume ever increasing responsibilities for the management, conduct and support of their local government.[11] *Williams* v. *Lee, supra,* at 222; *Iron Crow* v. *Oglala Sioux Tribe, supra,* at 99.

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[11] The power of the Hualapai and San Carlos Apache Indians to "levy and collect taxes" is expressly confirmed in tribal constitutions adopted pursuant to the Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. 476.

The Arizona Transaction Privilege Act, as applied to merchants selling personal property to Indians within an Indian reservation, necessarily conflicts with any tax the tribe having jurisdiction over that area might impose upon the same activity.[12] If both taxes are assessed, the added cost of doing business either will be absorbed by the seller or, more likely, will be passed on through higher prices to the Indian buyers. In the latter event, many consumers will purchase as much tangible personal property as possible off the reservation, thus frustrating collection of the tribal (but not the State) tax. In the former event, lower profit margins will inhibit the establishment or increase of trade within the reservation, again resulting in less revenue to the tribe.[13]

In addition to reducing tribal tax receipts, the Arizona Transaction Privilege Act also siphons substantial funds completely out of the reservation economy. Under Arizona Revised Statutes § 42-1309, income derived from the privilege tax is

> ". . . to be used in liquidating the outstanding obligations of the state and county governments, to aid in defraying the necessary and ordinary expenses of the state and the counties, to reduce or eliminate the annual tax levy on property for state and county purposes, and to reduce the levy on property for public school education. . . ."

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[12] The Papago Tribe of Arizona, for example, recently approved a tax of 3% upon the gross receipts from sales made within its reservation.

[13] Tribal income would be further cut to the extent rentals for premises leased to traders are measured by gross receipts or net profits.

On Indian reservations in Arizona, the State and counties do not furnish public school education for Indian children, provide health and medical services, build roads, maintain law and order or otherwise assume or incur any significant expenses of local government. Moreover, if an Indian on the reservation fails to pay for goods purchased, the seller may not even invoke State court process to collect the debt. *Williams* v. *Lee, supra.* By imposing the privilege tax upon reservation traders, therefore, appellees are collecting revenue to pay for services which the State does not actually perform.[14]

On repeated occasions in interstate commerce cases, this Court has invalidated actual or potential double taxation. *Railway Expenses Agency, Inc.* v. *Virginia,* 347 U.S. 359, 367-68 (1954); *Freeman* v. *Hewit,* 329 U.S. 249, 256-57 (1946); *J. D. Adams Mfg. Co.* v. *Storen,* 304 U.S. 307, 311-12 (1938). The Arizona Transaction Privilege Act, as applied to merchants selling personal property to Indians within an Indian reservation, is double taxation in classic form—an unapportioned levy assessed against activity over which another sovereign has taxing jurisdiction. In competition with the right of tribes to impose taxes within their own reservations, the State tax must fall.

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[14] The privilege tax is intended "to reduce or eliminate the annual tax levy on property. . . ." Arizona Rev. Stats. § 42-1309. The State of Arizona, of course, has disclaimed the right to tax tribal land within an Indian reservation. Act of June 20, 1910, 36 Stat. 557, 568, 569-70.

CONCLUSION

On the basis of the foregoing discussion, the conclusion is inescapable that the Arizona Transaction Privilege Act, as applied to non-Indian traders doing business with Indians on an Indian reservation: (1) places a direct burden upon commerce with Indian tribes in violation of Article I, Section 8, Clause 3 of the Constitution and the laws of the United States; and (2) interferes illegally with the exercise by Indian tribes of their inherent powers of local self-government. Accordingly, the Association on American Indian Affairs, Inc., the Hualapai Tribe of Arizona, the Salt River Pima-Maricopa Indian Community, and the San Carlos Apache Tribe of Arizona, as *amici curiae,* urge that the judgment of the Arizona Supreme Court upholding imposition of the State privilege tax be reversed.

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